

November 17, 2005

Ex Parte Communication

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20445

Re: CG Docket No. 05-231

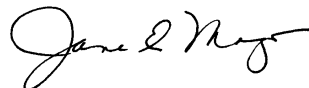
Dear Ms. Dortch:

Today, Ann Bobeck and the undersigned of NAB spoke with Heather Dixon to discuss closed captioning in the above-referenced docket. Specifically, we discussed the following points:

- 1) Regulations must be reasonable in light of both technology and feasibility;
- 2) NAB supports reasonable efforts to streamline the captioning complaint process;
- 3) NAB is concerned that extending the Electronic Newsroom Technique beyond the Top 25 markets would adversely affect medium and small broadcasters' ability to service their communities by making news production cost-prohibitive;
- 4) NAB has received numerous inquiries concerning the captioning of church services when the 100% new programming rule goes into effect in January 1, 2006; and
- 5) NAB has filed a request for extension of time for reply comments, currently due November 25, the day after Thanksgiving.

NAB distributed a copy of our extension request and initial comments. Please direct any questions concerning this matter to the undersigned.

Respectfully submitted,



Jane E. Mago

Enc.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)

Closed Captioning of Video Programming)

Telecommunications for the Deaf, Inc.)
Petition for Rulemaking

CG Docket No. 05-231

To: The Commission

REQUEST FOR EXTENSION OF TIME

Pursuant to 47 C.F.R. § 1.46, The National Association of Broadcasters (“NAB”)¹ hereby requests a 21-day extension of the deadline for filing reply comments in the above-captioned proceeding. Reply comments are currently due on November 25, 2005; we request an extension of that date until December 16, 2005.

The Commission’s Notice of Proposed Rulemaking produced a significant record from hundreds of commenters. Reviewing all of these filings for purposes of preparing a meaningful response is extremely time-consuming. NAB is also working to collect and analyze the information provided in the comments. We submit that the resulting substantive reply comments will enhance the Commission’s record in this proceeding, but also will require a reasonable amount of additional time. Additionally, the current Reply Comment deadline falls the day after the Thanksgiving holiday.

¹ NAB is a nonprofit, incorporated association of radio and television stations and networks that serves and represents the American broadcasting industry.

A brief extension of the Reply Comment deadline in this proceeding will enable the Commission to gather and consider a more complete factual record of the relevant legal issues, and as such, will serve the public interest. For the foregoing reasons, NAB respectfully requests a 21-day extension for filing reply comments in this proceeding.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**

1771 N Street, N.W.
Washington, D.C. 20036
Tel: (202) 429-5430

A handwritten signature in cursive script, reading "Marsha J. MacBride".

Marsha J. MacBride

November 15, 2005

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Closed Captioning of Video Programming)	CG Docket No. 05-231
)	
Telecommunications for the Deaf, Inc.)	
Petition for Rulemaking)	

To: The Commission

**COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

**NATIONAL ASSOCIATION OF
BROADCASTERS**

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November 10, 2005

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Executive Summary

The National Association of Broadcasters hereby comments in response to the *Notice of Proposed Rulemaking* in the closed captioning of video programming proceeding. When the FCC adopted closed captioning rules to implement Section 713 of the Communications Act, it sought to provide “a fair balance between the interests of persons with hearing disabilities and video programming interests.” To ensure that this careful balance is maintained, NAB agrees with the Commission that it is appropriate to review the closed captioning rules. NAB understands the desire of persons with hearing disabilities to have full access to video programming and applauds the FCC’s effort in this proceeding to develop a full record of the current state of captioning upon which all stakeholders can construct feasible solutions that will improve the quality of captioning.

NAB urges the Commission to approach this proceeding as it did before, consistent with Congressional intent, to balance all interests and find a practical way to increase caption availability and quality. We believe that improvements can be made, particularly with regard to the complaint process. NAB is concerned, however, that many of the proposed regulations will do little to improve captioning quality because they do not comport with current realities. Moreover, we are concerned that adoption of these proposals could undermine development of cost-effective methods captioning. For example, voice-recognition and other technologies expected to be improved and widely available have not been deployed during the phase-in period. The reality is that broadcasters must continue to rely heavily on a limited pool of persons to caption the programming they produce. And for programming they do not produce themselves, broadcasters must rely on the program producers to ensure the programming has

been properly captioned. Inherent in this process is an unavoidable truth, that in captioning and transmitting both live and recorded programming, human error precludes perfect captions.

Quality, monitoring and compliance regulations cannot overcome the practical burdens broadcasters face. Rather, they would place both unreasonable burdens and unachievable goals on broadcasters, particularly on medium and small market television stations who are struggling with declining news revenues and costs associated with converting to digital television.

Extending the prohibition on Electronic Newsroom Technique (“ENT”) beyond the top 25 markets would likely result, based on both cost considerations and the availability of real-time stenocaptioners, in a loss of news coverage. Given the realities broadcasters face, the proposed regulations are likely to have counter-productive consequences. They could, for example, deter the development of more cost-effective captioning technology. NAB therefore respectfully submits that the record here does not warrant such a change from the balanced approach adopted by the Commission in 1997.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Closed Captioning of Video Programming)	CG Docket No. 05-231
)	
Telecommunications for the Deaf, Inc.)	
Petition for Rulemaking)	

To: The Commission

**COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

I. Introduction.

The National Association of Broadcasters (“NAB”)¹ submits these comments in response to the Commission’s *Notice of Proposed Rulemaking* in the above-captioned proceeding.² Nearly eight years have passed since the FCC adopted closed captioning rules to implement Section 713 of the Communications Act, 47 U.S.C. § 613, dealing with Video Programming Accessibility.³ Consistent with the statute and its legislative history, the Commission established a reasonable timetable for increasing the amount of

¹ NAB is a nonprofit, incorporated association of radio and television stations and networks that serves and represents the American broadcasting industry.

² In the Matter of Closed Captioning of Video Programming, *Notice of Proposed Rulemaking*, CG Docket No. 05-231, rel. July 21, 2005 (“*Notice*”).

³ In the Matter of Closed Captioning and Video Description of Video Programming *Report and Order*, MM Docket No. 95-176, 13 FCC Rcd 3292-93 (1997) (“*Report and Order*”); In the Matter of Closed Captioning and Video Description of Video Programming, *Order On Reconsideration*, MM Docket No. 95-176, 13 FCC Rcd 19973 (1998) (“*Reconsideration Order*”).

captioned programming on television.⁴ As the Commission recognized, the rules sought to provide “a fair balance between the interests of persons with hearing disabilities and video programming interests.”⁵

To ensure that this careful balance is maintained, NAB agrees with the Commission that it is appropriate to review the closed captioning rules.⁶ NAB understands the desire of persons with hearing disabilities to have full access to video programming and applauds the FCC’s effort in this proceeding to develop a full record of the current state of captioning upon which all stakeholders can construct feasible solutions that will improve the quality of captioning.

In these comments, NAB urges the Commission to approach this proceeding as it did before, consistent with Congressional intent, to balance all interests and find a practical way to increase caption availability and quality. As discussed below, NAB believes that improvements can be made, particularly with regard to the complaint process. NAB is concerned, however, that many of the proposed regulations will do little to improve captioning quality because they do not comport with current realities and may also undermine development of cost-effective methods captioning. For example, voice-recognition and other technologies expected to be improved and widely available have not been deployed during the phase-in period. The reality is that broadcasters must continue to rely heavily on a limited pool of persons to caption the programming they

⁴ See H.R. Report 104-458, 104th Cong. 2nd Sess. (1995) at 182 (“Conference Report”). (“...the Commission shall establish reasonable timetables and exceptions for implementing this section. Such schedules should not be economically burdensome on program providers, distributors or the owners of such programs.”)

⁵ *Reconsideration Order* at ¶ 15.

⁶ *Notice* at ¶ 3.

produce. And for programming that they do not produce themselves, broadcasters must rely on the program producers to ensure the programming has been properly captioned. Inherent in this process is an unavoidable truth, that in captioning and transmitting both live and recorded programming, human error precludes perfect captions.

Quality, monitoring and compliance regulations cannot overcome the practical burdens broadcasters face. Rather, they would place both unreasonable burdens and unachievable goals on broadcasters, particularly on medium and small market television stations who are struggling with declining news revenues and costs associated with converting to digital television. Moreover, extending the prohibition on Electronic Newsroom Technique (“ENT”) beyond the top 25 markets would likely result, based on both cost considerations and the availability of real-time stenocaptioners, in a loss of news coverage. Because these do not benefit the overall public interest, NAB urges the Commission to refrain from imposing additional regulations on television broadcast stations at this time.

II. Both Congress And The Commission Recognized That Implementing Captioning Must Be Done On A Reasonable Basis.

Section 713 of the Communications Act recognized the need to balance the goal of achieving full accessibility with economic and technical constraints broadcasters and other program producers face. The statute empowers the FCC to exempt programs and classes of programs or services where “the provision of closed captioning would be economically burdensome to the provider owner of such programming.” 47 U.S.C. § 613(d)(1). The statute also permits providers and program owners to seek an exemption on a case-by-case basis where captioning requirements would create an undue burden. 47 U.S.C. § 613(d)(3). As the Conference Report explained, Congress specifically

contemplated under this latter provision that the Commission “shall balance the need for closed captioned programming against the potential for hindering the production and distribution of programming.” Conference Report at 183.

The Commission too recognized this need for reasonable application of the captioning requirement. Thus, when it concluded on reconsideration that 100% of new nonexempt programming should be captioned, the Commission went on to acknowledge that “[t]here are a variety of circumstances where captioning may be problematic. Such situations include, but are not limited to, equipment failures, the inability to obtain captioning resources on short notice or the receipt of programming without the expected captions.” *Reconsideration Order* at ¶ 10. The Commission further emphasized that it would not consider “*de minimis*” amounts of uncaptioned programming a violation of the rules. *Id.* And, the Commission rejected calls for monitoring and reporting because it concluded that the administrative burden of such a requirement would be too great. *Id.* at ¶ 11.

NAB submits that the Commission correctly interpreted that statute and its intent in establishing balanced captioning requirements. And while improvements can be made, the state of the captioning industry and technology has not changed sufficiently to warrant the imposition of obligations deemed too burdensome in the original *Report and Order*, or new requirements that place undue burdens on broadcasters and programming producers.

III. The Commission Should Streamline The Captioning Complaint Process.

One area where NAB believes improvements can be made is in its regulations governing captioning complaints. In its Petition, TDI noted that creating “a better system for alerting the proper people of a captioning issue would benefit all parties by shortening

the time-frames for resolution of similar problems.”⁷ In response to the Petition, the Commission now proposes to revise the current complaint process. *Notice* at ¶ 31. NAB supports this effort. Although NAB prefers that consumers contact the station directly as a more efficient means for resolving captioning issues, NAB also urges the Commission to consider utilizing a model similar to that adopted in the FCC’s *Video Description Order*. There, the Commission specifically implemented a complaint process “less onerous than the one established for closed captioning”⁸ by requiring that the Commission promptly forward complaints to a broadcast station or multichannel video provider (“MVPD”). In turn, the broadcaster or MVPD would generally have 30 days in which to respond, although there would be some flexibility allowed by authorizing Commission staff to “either shorten or lengthen the time required for responding to complaints in particular cases.”⁹ NAB recognizes that timely responses to captioning complaints best serve American consumers.

NAB also supports the Commission’s proposal that broadcasters post accessible contact information on their station websites. *Notice* at ¶ 32. We agree that it should be clear to consumers to which phone number and/or email address captioning complaints should be directed. Any requirement to post such information, however, must be limited

⁷ In the Matter of Closed Caption of Video Programming, *Petition for Rulemaking*, Telecommunications for the Deaf, *et al.*, RM Docket No. 11065, filed on June 23, 2004 (“*TDI Petition*”).

⁸ In the Matter of Implementation of Video Description of Video Programming, *Report and Order*, MM Docket No. 99-339, 15 FCC Rcd 15230 at ¶ 44 (2000).

⁹ *Id.* at ¶ 46.

to those stations that have already established Internet websites.¹⁰ Further, because the Internet is an efficient means by which Petitions can be posted, NAB supports the Commission's proposal that entities requesting an exemption based on an undue burden from the closed captioning rules be required to file electronically. *Notice* at ¶ 52. Not only would such postings ensure that persons with hearing disabilities have increased accessibility to Commission proceedings, it also comports with the Commission's trend towards mandatory electronic filing.

IV. The FCC Should Not Extend The Prohibition Against Electronic Newsroom Technique Use Beyond Top 25 Markets.

The Commission seeks comment on whether it should extend the prohibition on the use of ENT for captioning news beyond the top 25 markets. *Notice* at ¶ 48. As discussed below, the result of such an extension would be extremely burdensome, particularly to small and medium broadcasters who already are facing financing a digital transition and declining news revenues. Imposing such burdens may also have the unintended consequence of creating disincentives for local broadcasters to air local news.

In 1998, the Commission prohibited the major national broadcast networks and their affiliates from using Electronic Newsroom Technique ("ENT") in the top 25 television markets as defined by Nielsen's Designated Market Areas ("DMAs").¹¹ In imposing this limitation, the Commission recognized that a "real-time captioning requirement could impose an economic burden on smaller entities since resources are

¹⁰ The FCC adopted this approach in its EEO proceeding: there, the Commission specifically limited its requirement that broadcasters post the EEO public file report to those stations that have a station web site. *See In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second Report and Order and Third Notice of Proposed Rulemaking*, MM Docket No. 98-204, 17 FCC Rcd 24018 at ¶ 141 (2002).

¹¹ *Reconsideration Order* at ¶ 5.

likely to be limited, costs for real-time captioning remain high and methods for remote real-time captioning are still being developed.” *Reconsideration Order* at ¶ 37.

Many stations outside the top 25 markets currently rely on ENT to provide captions for local programs. This technology permits them to feed teleprompter or other scripted material into the captioning encoder, substantially reducing the cost of captioning. While it recognized that stations using ENT may have some unscripted portions of the newscasts uncaptioned, the Commission balanced this against the cost of live captioning and the absence of a large pool of trained stenocaptioners. It chose to urge stations to script (and therefore caption) additional portions of their news programs, and it committed itself to reexamining this issue in light of station experience and the availability of live captioning services or other new captioning technologies, including voice-recognition software.¹² In the intervening years, however, there have not been substantial developments in either captioning technologies or the number of stenocaptioners¹³ that justify an altering of this regulatory balance.

While NAB agrees with the Commission that since 1998 the costs of real-time captioning have generally declined,¹⁴ the costs are still significant. The cost of contracting for real-time captioning varies greatly, ranging from \$100 to approximately \$500 per hour.¹⁵ Moreover, the cost to stations is inversely proportional to a station’s

¹² The Commission also opined that during the phase-in of its captioning rules “video programming providers will have sufficient leeway to experiment and use new captioning techniques.” *Id.* at ¶ 42.

¹³ In discussions with the captioning community, NAB understands that the number of real-time stenocaptioners is approximately 300-400 persons.

¹⁴ *Notice* at ¶ 48.

¹⁵ Captioning costs were obtained via an informal survey of NAB member television stations. The annual cost of extending the prohibition of ENT to a station in a small market may exceed \$250,000 per year and would make local production cost-prohibitive.

“buying power” – small and medium market broadcasters who are not part of a station group typically receive less discounts than stations that are contracting with captioning companies for a “bulk discount.” As one small market broadcaster has commented, the annual costs from providing real-time captioning for newscasts are so significant that “revenues quite simply do not allow it.”¹⁶

Further, additional financial constraints on television broadcasters make a real-time captioning requirement for news impracticable beyond the top 25 markets. Television broadcasters are currently bearing the cost of transitioning to digital television, at an average cost of over \$1-2 million per station. In addition, dual transmission of both analog and digital signals adds utility costs of well over \$10,000 per month per station. And as detailed in the Radio and Television News Directors’ Association/Ball State University Annual Survey, there has been a significant decrease in the profitability of television news.¹⁷ Between 2004 and 2005 the number of television news operations producing a profit precipitously declined from 58.4% of stations surveyed to 44.5 %, the number breaking even rose from 10.4% to 24.2% and the number operating at a loss increased from 9.2% to 12.1%.¹⁸ These statistics are alarming because a significant portion of a television stations’ revenue is derived from its news. Simply stated, if the costs associated with producing news and other locally produced programming is unprofitable, the net result will be an eventual decline in such service.

¹⁶ In the Matter of Closed Captioning of Video Programming, *Comments of Bill Lamb*, CG Docket No. 05-231, Oct. 3., 2005 at 1 (“the cost of providing real-time closed captioning for our station’s newscasts would be at least \$151,520 for WDRB and WFTE, \$32,760 for KTRV, and \$77,000 for WLIO each year”).

¹⁷ See Bob Papper, *News, Staffing and Profitability Survey*, Communicator at 34 (Oct., 2005).

¹⁸ *Id.* at 36.

Were the Commission to mandate that news be captioned only through the use of real-time captioning, it would exacerbate the costs associated with news production. Captioning costs would significantly increase for the stations that rely on the use of ENT. Far more stations – particularly in smaller markets – will find that the costs of captioning are overly burdensome and, as a result, will seek waivers or be forced to reduce the amount of local news programs. Neither result would serve the public interest. Moreover, the limited supply of stenocaptioners necessitates that many stations (that air their programming during same or similar times) could not add captions at all.

ENT allows many stations the ability to deliver timely and relevant news programming to the local communities they serve. Much of the programming in local news and public affairs is prepared and packaged in advance of airing. Television talent generally adheres to these scripts as they are read through a teleprompter. Thus, the ENT conveys the primary substance of the news broadcast. Additionally, some stations that cannot afford real-time captioning for all the news they produce supplement ENT with live captioning of weather, traffic and late-breaking news.

The effect of extending the prohibition on the use of ENT would be a reduction in the amount of locally produced programming. The detriment to the public of such a result is evident. Given the substantial costs and practical difficulties, as well as the limited benefits, NAB urges the Commission to refrain from extending the prohibition on the use of ENT. In this instance, a properly conducted cost/benefit analysis of the proposed regulation, an integral part of agency decision making, would clearly demonstrate that expansion on the prohibition on the use of ENT is imprudent.¹⁹ In lieu

¹⁹ The Commission is required to reasonably assess the costs of the agency's actions. See, e.g., *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Ins.*, 463 U.S. 29, 54 (1983)

of a costly and burdensome measure, NAB urges the Commission to work with industry to develop feasible solutions for improved, but cost-effective methods of news captioning, including the development of voice-recognition and other technologies. The Commission should ensure that it leave providers with sufficient flexibility to avoid a loss of valuable programming for the public at large while meeting the needs of the hearing-impaired.

V. The FCC Should Not Impose Quality Standards, Monitoring And Compliance Reporting Requirements.

The Commission seeks comment on a number of captioning requirements including technical and non-technical quality standards, ranging from spelling, grammar, punctuation, verbatim or edited for reading speed, incomplete, unsynchronized captions, etc. *Notice* at ¶¶ 10-18. The Commission also queries whether it should impose standard base forfeitures based on failure to meet such requirements. *Notice* at ¶ 37. Previously, the Commission declined to impose standards governing the quality of closed captioning, noting the difficulty of establishing standards, the administrative burden that would be imposed on video programming providers and the Commission if such standards were adopted, and the marketplace incentives for programming providers to ensure the high quality of captioned programs.²⁰ Those same concerns are present today. The

(agency needs to “look at the costs as well as the benefits” of a regulatory standard); *People of the State of California v. FCC*, 905 F.2d 1217, 1231 (9th Cir. 1990) (reviewing court “must be satisfied that the Commission’s assessment of the various costs and benefits is reasonable in light of the administrative record,” and “if the FCC’s evaluation of any significant element in the cost/benefit analysis lacks record support,” then the court “cannot uphold the agency action” under the Administrative Procedure Act); *United States Telecom Association v. FCC*, 227 F.3d 450, 461 (D.C. Cir. 2000) (finding that FCC’s failure to explain how it implemented provisions of the Communications Assistance for Law Enforcement Act in a “cost-effective” manner was “a classic case of arbitrary and capricious agency action”).

²⁰ *Report and Order* at ¶¶ 222-224.

Commission should again conclude that these regulations would be adverse to public interest.

A. Strict Qualitative Standards and Forfeitures Are Unnecessary And May Lead To A Decline Of Live Programming.

While the NAB recognizes that the quality of captioning can be improved, it does not believe that strict qualitative standards, such as specific error rates, and high, per-incident forfeitures are necessary to accomplish this goal. Broadcasters have a vested interest in serving their communities, including the millions of Americans who are deaf or hard of hearing. Moreover, local programming, a hallmark of broadcasters' community service, is both extremely important and relevant to viewers. For example, through the use of live news coverage and the Emergency Alert System ("EAS"), broadcasters have invested millions of dollars to ensure that the local communities they serve have timely access to critical, and often life-saving information. Arbitrary standards exposing broadcasters to potential fines would likely be counterproductive, leading to less locally produced programming – not improved quality.

Before the Commission imposes significant and burdensome regulatory measures, it must first demonstrate that its policy is supported by a sufficient factual record.²¹

While other parties have cited examples of captioning errors, the record does not evidence a widespread failure on broadcasters' delivery of high-quality captioning that would warrant a change in the agency's course. To the contrary, broadcasters, who collectively caption hundreds of thousands of hours of broadcast programming, strive to ensure that the programming they deliver to their consumers is as error-free as humanly

²¹ See, e.g., *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 763 (6th Cir. 1995) (court rejected restrictions on cellular providers' participation in certain auctions as arbitrary because Commission failed to factually support the rules).

practicable. Moreover, there is no evidence that regulation will lead to improved standards. For example, a verbatim requirement would not reflect the reality that captioning requires artistic judgment on the part of a captioner. In order to caption, there are inherent limitations in the translation of spoken word to written form that is both timely and formatted to avoid screen obstruction. Imposing arbitrary quality standards, therefore, may inadvertently undermine the judgment of the captioner.

In reality, despite broadcasters' very best efforts, captioning will have both technical and non-technical errors. Simply stated, the human factor associated with both creating and encoding captioning cannot be reduced through rulemaking. Technical glitches can be unavoidable – for example, most real-time stenocaptioners work remotely to deliver captioning. Disruptions to phone or Internet service, especially during emergencies, are unavoidable. Obscure words and little known names of places abound across communities served by broadcasters and could easily tally up the error rate in a hurry, while the viewer familiar with the words will most likely know to what the stenocaptioner is referring. For example, a captioner for a Philadelphia, PA, station that is not familiar with the Philadelphia market is not likely to spell Conshohocken or Skunkkill correctly, for reasons that are evident. NAB submits that a more realistic and productive approach is to require broadcasters to make best efforts, not impose an arbitrary error rate or some similar benchmark.

Potential consumer harm in imposing unreasonable qualitative standards for closed captioning is very real. Faced with task of delivering “perfect” captioning or risk significant forfeitures, local stations may err on the side of caution and refrain from airing live, local programming, including breaking news and emergency weather information. Indeed, Congress’ directed that the Commission’s captioning rules not result in the loss

of programming choices.²² The Commission therefore should not impose regulatory benchmarks that are so onerous that they act as a deterrent to delivering local programming. Instead, NAB urges the Commission to retain Congress' balance, as it has done during the past eight years.

B. The Commission Should Refrain From Imposing Monitoring And Reporting Requirements.

In addition to proposing technical and non-technical quality standards for captioning, the Commission seeks comment on whether it should impose specific requirements for monitoring captioning and maintaining their equipment and signal transmissions. *Notice* at ¶ 25. The Commission also queries whether video programming distributors should be required to file compliance reports. *Notice* at ¶ 43. Such requirements would reverse the Commission's findings in 1997 that "specific recordkeeping or filing requirements would be unnecessarily burdensome and administratively cumbersome." *Report and Order* at ¶ 244.

NAB submits that reversal is not warranted. The burden to television stations and to the agency that would result from monitoring and reporting requirements remains substantial. In fact, given the advent of digital television and multicast programming, the cost is even greater than it was in 1997. And there is no clear evidence that such requirements would improve captioning. We specifically disagree with TDI's assertion that continuous monitoring would "eliminate the occurrence of technical programs in this first place, and *efficiently repair such problems* that do occur...." *TDI Petition* at ¶ 29. NAB is concerned that there may be a fundamental misunderstanding of what is

²² See H.R. Rep. No. 458, 104th Cong., 2d Sess. 183 (1996) (House Report provided that "the Commission shall balance the need for closed captioned programming against the potential for hindering the development and distribution of programming.").

practicable for television broadcast stations in both monitoring and resolving captioning errors. While broadcasters routinely monitor for the *presence* of closed captioning, generally via monitoring in the master control room, and regularly check the studio signal paths and encoding equipment to ensure its proper operation, it is simply impracticable for broadcasters to employ full-time staff devoted to monitoring for the *accuracy* of such captioning. Such monitoring requires that a person devote 100% of their attention to proofreading all captions as they are being transmitted. Such monitoring, which is extremely labor-intensive, would be cost-prohibitive, particularly for stations in smaller markets.

Aside from correcting a station's malfunctioning equipment, other captioning errors cannot not be easily remedied. While ideally such problems would be easily corrected, if captioning problems originate at another source, it may take some time to resolve the problem. Should the captioning be missing, garbled, or offset during a particular program from an outside source, for example, the station must rely on others to help identify the source of the problem and then take steps to correct captioning errors. Moreover, in many instances, stations may not have possession of programs substantially in advance of their airing and thus will be unable to prescreen programming for accuracy in captioning. For example, many programs, such as afternoon talk shows, are aired as they are being fed to the station (via satellite), making it impossible to reformat or repair damage captioned.

Even for programming acquired substantially in advance of its broadcast, the process of repairing/reformatting damaged or missing captions is considerable. The broadcaster could either contact the original captioner of the program, return the tape to

them and have the captions reformatted, or attempt to repair and reform the captions itself. Either scenario involves significant delays and costs – the process of pre-screening a program and repairing or reformatting captions would take in excess of three (3) times the length of the program. In addition, a broadcaster would need to own the caption authoring equipment to perform such a task.²³ The record here fails to demonstrate that the problem of occasional errors would justify the imposition of such a burden.

The Commission therefore should not require broadcasters to be responsible for captions damaged by others or by normal editing processing. Absent evidence of a widespread captioning failure, the occasional failure of the producer to supply captioned material should not result in the station's having failed to meet their captioning responsibilities. Indeed, the House Report on the Telecommunications Act makes clear that it was Congress' understanding that the obligation to insert captioning into programming would generally rest with producers, recognizing the burdens and inefficiencies that would be created if each station were obliged to caption programs they did not produce. *See* H.R. Rep. No. 204, 104th Cong., 1st Sess. 114 (1995). The fact that often programming aired on broadcast television stations is obtained from another source was known to the Congress when it expressed its view that captioning obligations should fall on producers. The shifting of such a significant burden of captioning to stations is different from that which Congress envisioned. Nor is it realistic to expect that individual stations can monitor and correct, if necessary, for captioning programming that

²³ This equipment would need to be separate and in addition to the “on-air” caption encoding equipment. Such equipment is readily available from various vendors. The cost ranges from \$7,000 to \$20,000.

they do not produce. The economic burden of requiring full time captioning staffs for every station would be enormous.

Another fundamental problem of requiring technical and non-technical quality captioning standards, along with monitoring and reporting requirements, is that compliance would be impossible. The proposed regulations, coupled with proposed fines, are a *de facto* requirement for television broadcasters to employ multiple, full-time stenocaptioners to correct any errors that might arise during the airing of programming on both digital and analog channels, both for the programming they produce, and for the majority of their programming which they receive from other sources. Broadcasters, who are preparing to meet the January 1, 2006 benchmark to caption 100% of non-exempt programming, are already having difficulties in procuring qualitative assurances from captioning firms because the number of stenocaptioners is extremely limited. Due to this intrinsic limitation, it would be not viable for each over-the-air broadcaster (let alone each MVPD) to employ persons who can correct, in real-time, the occasional glitches in captioning. Moreover, the fact remains that once a caption has aired incorrectly, there is no way to correct the captions – the moment is gone. Regulation cannot eliminate errors that are discovered during the airing of programs.

C. In Lieu Of Onerous Regulations, The Commission Should Support The Development Of New Captioning Technologies.

In lieu of establishing quality and monitoring requirements, the Commission should instead focus on fostering the development of new captioning technologies. Eight years ago when the Commission adopted the closed captioning rules, there was a presumption that “as a result of [the FCC’s] requirements and the increased demand for captioning,” numerous new captioning technologies would be developed. *Report and*

Order at ¶ 250. While there have been improvements, technology has not advanced to the point where the captioning process is automated. Cost-efficient technologies, such as voice-recognition software, still need the opportunity to develop. Currently, available voice-recognition systems are about 90% accurate. While this does not match the accuracy level of a real-time stenocaptioner, it does provide – due to its lower cost – a means to caption some programming that would not otherwise be able to be captioned.

Establishing specific accuracy benchmarks and onerous monitoring requirements will frustrate the development of such new technologies because broadcasters and MVPDs will be deterred from utilizing new technologies. The inevitable result would be a slow-down in improving these new captioning technologies because captioning companies will not have the money to invest in research and development. Moreover, companies that develop other technologies which, in the future, could be applied to captioning would be discouraged from entering the captioning market because they might not initially meet certain accuracy benchmarks. Thus, adopting specific accuracy requirements could have the unintended consequence of stifling captioning innovation entirely.

VI. Conclusion.

For the above-described reasons, NAB has supported in the past and continues to support various efforts to improve closed captioning. While we support measures to streamline the captioning complaint process, many of the proposed rules quality, monitoring and reporting requirements will not lead to improvements in captioning quality. Rather, they pose undue burdens on television broadcasters, particularly in medium and small markets. And, given the realities broadcasters face, are likely to have counter-productive consequences. They could, for example, deter the development of

more cost-effective captioning technology. NAB respectfully submits that the record here does not warrant such a change in agency course.

Respectfully submitted,

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